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No. 83-469 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY G. YOUNG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT

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June, 1984

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QUESTION PRESENTED

Whether the Court of Appeals erred in reversing and remanding the case for new trial on the ground that the prosecutor's statements of his personal belief in respondent's guilt constituted prosecutorial misconduct.

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BRIEF FOR THE RESPONDENT

STATEMENT

I.
NO FRAUDULENT INTENT

Billy G. Young was charged with engaging in a "scheme to defraud" by selling fuel oil, certified as crude oil, to Apco Oil Corporation. Young's defense was that he was totally without fraudulent intent. The record shows that Young's actions were done in good faith and without the requisite *mens rea* to support a criminal conviction. The government witnesses who were personally acquainted with Billy Young testified to his honesty and integrity (Tr. 57, 115, 331, 359). The record is replete with testimony of this type showing the absence of fraudulent intent. Indeed, this testimony was given by Hugh Bradley, Apco's former vice president for supply and transportation (Tr. 359). Further, the gov-

ernment witnesses who knew Young testified that he did not, in their opinion, have any intent to defraud Apco (Tr. 58, 78).

II.
THE RESPONDENT

Billy G. Young, age 46 at time of trial, went to the eighth grade at a country school in eastern Oklahoma and then went to work to support his family, his father having been disabled in an accident (Tr. 469). Young has spent most of his life working in some phase of the oil industry, including working on drilling rigs, driving tank trucks, and doing the other manual labor associated with the oil field. Because of his ability to get along well with people and his qualities of industriousness and reliability, he became foreman over other men much his senior, and eventually entered the ranks of management. In 1974 he became an employee of Apco Oil Corporation in Oklahoma City. In January, 1975, he was offered a job as general manager of Compton Petroleum Company located in Abilene, Texas. (Compton was wholly owned by B & B Trading Company of Tulsa, Oklahoma, and had two presidents during the relevant period — Allen Daigle and Bob White). After Young had been with Compton about a year, he was made a vice-president. Prior to this indictment, Young had never been charged with criminal violations of any kind.

III.
BASIS FOR THE INDICTMENT

After Young had been with Compton a little over a year, he began receiving telephone calls from a man named Ken Ross. Young and Ross had become friends when they worked for the same oil company in the early '70s. By late 1976 Ross had fallen on hard times; he repeatedly called Young and Loretta Young, Billy's wife, at home and at the office wanting them to help him out and specifically seeking to sell some fuel oil (Tr. 329, 330, 476). Ross and the woman he subsequently married were then operating an outfit called "Prime Resources" in Tulsa. Ross told Young he could legally certify fuel oil as crude oil under the pertinent regulations. Young knew it was legally possible to do this (Tr. 477).

In December, 1976, Young hosted a group of Apco employees at Compton's hunting lodge near Abilene. Hugh Bradley, Apco's vice president, told Young that Apco was badly in need of more crude oil at its Cyril, Oklahoma refinery (Tr. 351). Having worked for Apco, Young knew the problems Apco had in obtaining product for processing at its inland refinery at Cyril. Apco was, in fact, essentially at the mercy of Koch Oil Company, a large crude oil trader that supplied over 25% of the Cyril refinery's daily runs (Tr. 360). Further, Young knew that it was not economical to operate a refinery at less than full capacity, because fixed costs were too high to be covered when the refinery operated on a reduced capacity (Tr. 386). The general quality of crude oil supplied to Apco's Cyril refinery was low gravity, some of it as low as 18° — indeed, it was so tar-like that it could not be transported in cold weather without first

being heated to a high temperature (Tr. 387, 388, 391). It is common practice in the industry to blend low gravity oil with high gravity oil to improve the overall quality of the mix. Compton's crude oil trader testified:

"Q. Is there anything unusual in your experiences in the oil industry with blending condensate with crude oil to increase the gravity and quality of the crude?

A. No sir, it's a common practice." (Testimony of Phillip Mark Alexander, Tr. 55).

Indeed, Koch Oil Company did it consistently. The former vice president for supply and transportation of Apco Oil Corporation testified:

"Q. Did Koch [Oil Company] frequently sell to Apco low gravity crude oil?

A. What they did they blended a low gravity with a high gravity condensate and what we bought was a 40 gravity or a good gravity crude oil.

Q. But Koch is — well, if I said Koch is notorious for blending low quality, low gravity crude with condensate would you agree with that statement?

A. I would hate to use the word notorious.

Q. Well, known for that?

A. Well known.

Q. You would agree with that?

A. I would agree with that.

Q. And it's one of the biggest crude oil traders in the industry, isn't it?

A. Yes." (Testimony of Hugh Bradley, Tr. 360, 361.)

In response to Hugh Bradley's inquiry, Young told Bradley he knew where he could get some low gravity crude. Bradley told Young that Apco needed it badly and to bring it on regardless of quality. Young informed Ross that he had found a buyer. Young arranged to purchase condensate from Mustang Fuel Company and Summit Oil Company to blend with the fuel oil to reconstitute the stream of oil in its original condition. Condensate is generally regarded as the highest quality crude oil available (Tr. 56). It has a gravity as high as 80°. It contains only the "high" ends of the typical crude oil barrel, that is, the components that produce naptha and gasoline (diesel and motor oil generally coming from the "lower" ends of the barrel). The fuel oil Young arranged to buy was No. 4 oil, which still has products in it that may be refined through a vacuum unit (which Apco had at its Cyril refinery) (Tr. 426). Number 4 oil is referred to as unfinished oil under the Department of Energy Regulations (Tr. 427).

Young knew that high gravity condensate would make the total mix a better stream of oil than Apco was generally getting (Tr. 56). The gravity of the blended stream was actually identical, or superior, to the lease crude being sold to Apco at its pipeline gathering stations. Compton's crude oil accountant testified:

"Q. And there's no question based upon Apco's tests that putting the condensate with the fuel oil made the gravity identical to the crude oil is there?

A. It's identical." (Testimony of J. M. Huff, Tr. 220.)

Young made it clear to Compton employees that improving the stream of oil to Apco was the reason for the blend. The operation's manager for Compton testified:

"Q. And Billy said this would give Apco the same equivalent as the quality it was getting elsewhere, didn't he?

A. Yes, sir.

Q. Billy had no intent to defraud Apco, did he, Mr. Fuller?

A. Not in my opinion, no sir." (Testimony of Kenneth C. Fuller, Tr. 78.)

Thus, Young thought he was doing a favor for all parties involved: Apco would get the supply of product it badly needed to improve the economic efficiency of its Cyril refinery operations, Ross would make the sales he desperately needed, and Compton would make at least a slight profit. This latter point merits emphasis: Compton actually lost money on its purchases of condensate to blend with the fuel oil (Tr. 480), but had a sufficient margin in its overall trucking to come out with a small profit. Young himself made no money on the transaction (Tr. 331, 338). The FBI conducted an intensive investigation to try to find that Young took kickbacks or otherwise got illegal gain. The FBI found that he did not (Tr. 300).

At trial, the prosecuting attorney cross-examined Young on the point that he got a bonus one year of 1% of the net profits of Compton. It was for job performance beginning in 1976, before there were any sales by Compton of fuel oil and condensate to Apco (Tr. 504). Yet, during the cross-examination and in closing argument, the prosecutor held out this bonus as an illegal inducement. The prosecutor's statements were improper and incorrect. Further, Compton sales to Apco were but a tiny fraction of its general operations.[1] Indeed, it's not certain that Compton had *any* "net profit" on its sales to Apco. Certainly the government offered no proof that it had any net profit. The only testimony on this point came from respondent.

"Q. What did you pay for that condensate compared to what you sold it to — sold it for to Apco?

A. Well, if I recollect, our sales to Apco was 85 cents over posting, that was considered our handling and gathering for trucking, et cetera. The portion we paid for Mustang, we gave 65 cents over posting. For the portion from Summitt we had to give 80 cents. But then we had the transportation of transporting that into Apco which overall we actually lost money on the condensate portion of it. But I felt like that we give Apco a good barrel and therefore since Apco was friends of mine, all the people in Apco was I consider some of my closest friends was helping them out because it was their job to get the supply in and by getting the fuel oil at a cheaper price, we could afford to pay a little more to get it to where we could come out." (Billy Young Testimony, Tr. 480, 481.)

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[1] Government counsel also questioned Young on cross-examination about "buying a refinery" after leaving Compton's employment in 1979. Government counsel used this point, utterly without evidentiary support, in closing argument to suggest to the jury that Young "bought the refinery" with money illegally obtained in the sales to Apco. Astoundingly, the trial court likewise referred to this as a basis for imposing sentence of two years imprisonment on Young at the sentencing hearing. In truth, Young obtained a partnership interest in a refining company totally on borrowed money after he left Compton's employment. The business was financially successful for a period of time thereafter, although it subsequently went bankrupt. The matter was utterly irrelevant to the charges against Young, and obviously prejudiced the jury.

As noted above, Young himself got no money or other thing of value as a result of Compton selling the fuel oil/condensate blend to Apco. There is no evidence to the contrary. But, as will be shown more fully later, the prosecutor repeatedly suggested to the jury that he had gotten money.

The relationship between Compton and Apco had existed for many years by written contract. It called for Compton to deliver sweet Texas crude to Apco and was signed by Billy Young. Likewise, Apco had long been a seller of crude oil to Compton. In short, they sold product back and forth and had done so for years before Billy Young went to Compton, and continued as trading partners after Billy Young left Compton. In fulfillment of the contract, Compton sold lease crude in large quantities to Apco throughout the period that the blend of fuel oil and condensate was being delivered to the Cyril refinery (Tr. 61, 62). The lease crude went into various Apco pipeline stations as well as into the Cyril refinery. Although the prosecutor consistently sought to leave the impression with the jury that Compton was selling only burner fuel to Apco, the fact is that during the January to September period covered by the indictment (as well as before and after) Compton sold lease crude oil to Apco pursuant to its contract, as well as the blend of fuel oil and condensate which was delivered to Cyril. The operations manager for Compton testified:

"Q. Was lease crude going to Apco at Cyril at the same time that the condensate and fuel oil were going there?

A. Oh yeah.

Q. Plain old virgin crude oil?

A. Yes, sir.

Q. And Mr. Fuller, was lease crude going to Apco at various pipe line terminals in Texas and Oklahoma?

A. Yes. sir.

Q. During that same period of time?

A. Yes, sir.

Q. Lots of it?

A. Yeah.

Q. No fuel oil in it?

A. No." (Testimony of Kenneth C. Fuller, Tr. 80.)

The gravity of the blend of fuel oil and condensate was generally higher than the gravity of the crude oil that Apco sold to Compton during this period (Tr. 220, 224).

Pride refinery is located a few miles from Compton's yard in Abilene. Producers Crude Oil Company (formerly known as Lancers) is also based in Abilene, and owned by a man named Truett Davis. Young and Davis were acquainted through prior business dealings. Producers Crude bought No. 4 fuel oil from Pride Refinery and hauled it to two 500-barrel holding tanks in Compton's yard. The Producers' truck that hauled the fuel oil was usually driven by one Mike Rawlings (he was related by marriage to Young), and made three or four trips a day. These trips were made in broad daylight and there was no attempt to keep them secret. Essentially everyone who was employed at Compton knew that the company was purchasing fuel oil, blending it with high gravity condensate, and selling the stream to Apco (Tr. 121). The fuel oil was transported

by truck from Abilene to Cyril where it was off-loaded into "LACT" units at the refinery. The trucks then drove to Chickasha, Oklahoma, picked up the condensate, and returned to Cyril to off-load it into the same sample tanks where the blending took place (Tr. 123). Apco took a sample from each combined load and tested it.[2]

IV.
NO COMPLAINTS BY APCO

The period of time covered by Compton's sales of the blend of the fuel oil and condensate to Apco was from January to September, 1977. As noted, Apco regularly tested the product being delivered by Compton. For over six months, Apco had no complaints. The product tested satisfactorily and the output of the refinery was not adversely affected.[3] It was not until July that Apco experienced excess production of residual fuel. That is the time that an entity called Pioneer Oil Company started deliv-

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2 The prosecutor also repeatedly tried to leave the impression with the jury that Compton's drivers were engaging in various acts to manipulate the samples or engaging in the act of concealment. The drivers all denied any such acts (Tr. 128, 129, 143). The prosecutor's examination on these points was done without any support in testimony ever elicited. It was improper. It was done for the sole purpose of unfairly prejudicing the jury.

3 "Q. In other words, no problem with the product from Compton was discovered, was found, was indicated, was reported to you of any kind through the months of January to July, 1977?

A. That's right.

Q. And Apco was testing the product and making their gauges on it, had a stock report of what was coming out of that refinery and everything was okay, wasn't it?

A. Yes." (Testimony of Hugh Bradley, Tr. 364.)

ering No. 6 fuel oil (sometimes called burner fuel) to the Cyril refinery. The fuel oil delivered by Pioneer had no condensate or other lease crude blended back into it (Tr. 358, 385). Apco carefully investigated the cause for the residual build-up and found the straight fuel oil from Pioneer. In the process of its investigation of all suppliers, Apco conducted a chemical analysis of Compton's deliveries and found it was approximately 50% fuel oil. Hugh Bradley and Don Heavin brought this to Young's attention. He told them he was not aware of fuel oil in the stream but if there was, he would shut it off. The blend of fuel oil and condensate from Compton ended.

V.
DEPARTMENT OF ENERGY REGULATIONS

In the government's allocation of energy resources program that followed the Arab oil embargo of 1973, the price of hydrocarbons was structured in "tiers" and the Department of Energy formulated regulations designed, among other things, to assure that all refineries paid essentially the same price for oil. It is fair and accurate to say that these provisions were exceedingly complex (Tr. 367). The regulations stated, inter alia, that certification of crude oil "tiers" was to be made on the basis of what kind of components constituted over 50% of the total "stream," it being a common practice in the industry to "blend" various types and qualities of oil together for various purposes, some technical and some practical.[4] It was Young's understanding

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4 The entitlements and certification program were no longer in existence at the time of trial; they were all rescinded by President Reagan soon after he took office (Tr. 367, 368).

that so long as over 50% of the total stream sold Apco was crude oil, it could be so certified without violation of any laws or regulations. (Tr. 483; see, defendant's Exhibit 18.) Others, far more sophisticated than Young, held the same view. Apco's former vice president of supply and transportation testified:

"Q. Are you acquainted with the Department of Energy regulations with reference to how you certify whatever makes up the principal component of the blend?

A. Somewhat.

Q. What is your understanding?

A. That if a crude oil contains more than 50% of a tier it can be certified as that tier crude.

* * *

Q. The regulations and the way the entitlements and certification program worked was very complicated, would you agree with that?

A. Extremely so.

Q. In fact, have you tried to read some of those regulations and couldn't make a lick of sense out of them?

A. Yeah, very much so.

Q. Do you have a college degree?

A. Yes." (Testimony of Hugh Bradley, Tr. 366, 367).

Over 50% of what Compton sold to Apco was lease crude oil.[5] Compton certified to Apco exactly what Prime

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[5] "Q. What was the major portion of — that Compton — well, by far that Compton was selling to Apco, was it crude oil or was it this fuel oil portion?

certified to Compton (Tr. 366). Apco made the certification reports to the Department of Energy for recording of entitlements. The certifications were made by Apco in 1977. The government had never attempted to cause Apco to make any adjustments in its reports or refund any money (Tr. 440). Nevertheless, the prosecutor told the jury the government *would* come back against Apco for reimbursement of any imbalance in the entitlements payments (Tr. 551). There is absolutely no support in the record for this statement. Apco's former vice president of governmental regulations and compliance testified:

"Q. Well, Mr. Wolf, has there been any adjustment whatever to Apco under this entitlements program on anything sold to it by Compton?

A. Not to my knowledge, no." (Testimony of Vincent L. Wolf, Tr. 440).

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[5] (Continued)

A. It was definitely crude oil.

Q. By overwhelming, isn't that so?

A. Yes, I would say by as much as 70 percent.

Q. And in your years of working for various oil companies, how common was the practice of blending to increase the gravity and quality of the oil?

A. Very common, all companies do it, even majors like the gentleman stated is here this morning when you get into a refinery, they like all various types of crude oil, gravities and condesate and everything mixed, * * *." (Testimony of Billy Young, Tr. 482, 483).

VI.
THE PROSECUTOR'S BELIEF IN RESPONDENT'S GUILT

The centerpost of Young's defense was that he simply never had any intent to defraud Apco or anyone else. Since the good faith of the defendant is an absolute defense in a criminal fraud case, the prosecutor bolstered the government's case by repeatedly stating to the jury, in his closing rebuttal argument, his own personal belief in Young's guilt:

> "I think [defense counsel] said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, *I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did.* If we are allowed to give our personal impressions since it was asked of me.
>
> * * *
>
> "I don't know what you call that, *I call it fraud.*
>
> "You can look at the evidence and you can remember the testimony, you remember what they said and what he admitted they said. *I think it's a fraud.*
>
> * * *
>
> "He said — Mr. Bailey said Apco didn't lose, says doesn't think anyone will come back. Well, what he thinks, they won't come back but *my experience in these matters is when the government does something like this they're going to come back.* All that money that Apco got for this stripper and new oil, Al Green at the Apco trust he's going to get some kind of invoices. *That's what I think.*
>
> * * *
>
> "Well, Mr. Bailey said that Mr. Young acted with honor and integrity in this case, he was the only one that did

> it. Well, he got all of his friends at Compton involved in this thing and he told his friends at Apco, Hugh Bradley, Don Heavin, said, no, I'm not selling you fuel oil. *I don't know whether you call it honor and integrity, I don't call it that, Mr. Bailey does. If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law that this Judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it."* (Tr. 549-552) (Emphasis supplied)

The foregoing statements by the prosecutor of his personal belief in Young's intent to defraud and the duty of the jurors to find Young guilty caused the jury to return a verdict of guilty.

SUMMARY OF ARGUMENT

Respondent's defense was that he acted in complete good faith and that he had no intent to defraud. The proof at trial strongly supported his defense. The prosecutor repeatedly stated in closing rebuttal argument that he personally believed respondent intended to defraud. The prosecutor's statements had nothing to do with the evidence; the statements were designed to — and did — destroy the respondent's defense without regard to the proof. The prosecutor further admonished the jurors of their duty to find respondent guilty. The intimidated jurors did as they were told by the prosecutor. The prosecutor's statements of his personal belief and knowledge were not invited by anything said by defense counsel. The prosecutor's statements were not "harmless." The statemnets were plain error requiring reversal and remand.

ARGUMENT

THE PROSECUTING ATTORNEY'S STATEMENT OF HIS PERSONAL BELIEF IN RESPONDENT'S GUILT CONSTITUTES PROSECUTORIAL MISCONDUCT AND IS REVERSIBLE ERROR

The government apparently concedes that it was error for the prosecutor to state his personal belief that Young was guilty. The brief for the United States states on p. 15:

> "The prosecutor in rebuttal argument at trial stated his personal belief that respondent was guilty of fraud. Such a statement, examined in isolation, would be prosecutorial error."

But the government contends that the decision by the Court of Appeals remanding the case for new trial was nevertheless erroneous. The government's view of the evidence impels it to the conclusion, not surprisingly, that the case against respondent was "overwhelming" and therefore the prosecutor's statements of his personal belief in respondent's guilt were "harmless." The government appears to view the case as turning simply on the issue of whether respondent sold Apco a stream with fuel oil in it. Respondent readily admitted in his testimony at trial that portions of the stream sold to Apco contained fuel oil (Tr. 476). There was, in short, no dispute on that point. What was in sharp dispute was the issue of good faith. Put another way, the core issue at trial was whether Young intended to defraud Apco. In a criminal fraud case, the government is obligated to prove beyond a reasonable doubt that the defendant had a specific intent to defraud. As the Seventh Circuit Court of Appeals recently stated:

> "Mail fraud is a specific intent crime. The government is required to prove beyond a reasonable doubt that the defendant intended to defraud. *United States* v. *Weidman*, 572 F.2d 1199, 1207 (7th Cir. 1978), cert. denied, 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978); *United States* v. *Marine*, 413 F.2d 214, 216 (7th Cir. 1969), cert. denied, 396 U.S. 1001, 90 S.Ct. 550, 24 L.Ed2d 493 (1970). Thus, good faith, or the absence of an intent to defraud, is a complete defense to a charge of mail fraud. *United States* v. *Hutul*, 416 F.2d 607, 624 (7th Cir. 1969), cert. denied sub. nom. *Sacks* v. *United States*, 396 U.S. 1007, 90 S.Ct. 562, 24 L.Ed.2d 499, reh. denied, 397 U.S. 1081, 90 S.Ct. 1519, 25 L.Ed.2d 820 (1970)." *United States* v. *Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1982).

In *Steiger* v. *United States*, 373 F.2d 133, 135 (10th Cir. 1967), the court stated:

> "Good faith is a complete defense to a charge of using the mails to defraud in violation of § 1341 * * *."

In *United States* v. *Foshee*, 578 F.2d 629 (5th Cir. 1978), the court held:

> "It must be remembered that the burden is on the Government to prove beyond a reasonable doubt that the defendants had the specific intent to defraud. We have stated before that in mail fraud cases proof of intent is 'paramount . . . because the good faith of a defendant . . . is ordinarily a complete defense.' *Coleman* v. *United States*, 5 Cir., 1948, 167 F.2d 837, 839. Indeed, 'often the only available defense is that of good faith.'" 578 F.2d at 634.

Likewise, the charge of making a false statement in violation of 18 U.S.C. § 1001 requires proof beyond a reasonable doubt of specific intent. In *United States* v. *Lange*, 528 F.2d 1280 (5th Cir. 1976), the court held:

"Proof of five elements is essential to sustain a conviction under the false statement proscription of § 1001: (1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction. * * * it is our firm conviction that the necessary *mens rea* was not shown.

* * *

"A violation of § 1001 requires proof that the defendant had the specific intent to make a false or fraudulent statement, [citing cases]. The misrepresentation must have been made deliberately, [citing case], knowingly and willfully." 528 F.2d at 1287, 1288.

Viewed from the prospective of fraudulent intent, the government's case was exceedingly weak. There simply was no convincing evidence of any fraudulent intent. The prosecutor's repeated statements of his personal belief in Young's guilt was intended to destroy Young's only defense, which was his good faith belief that he was not doing wrong. Young did not deny the blending of a stream of condensate and fuel oil; rather, his defense was that it was done without any fraudulent intent whatsoever. There was ample evidence to support Young's defense. The jury did not return a verdict of guilty against Billy Young based on the evidence. The jury returned a verdict of guilty because of the prosecutor's repeated statements of his personal belief in Young's guilt and because of the prosecutor's insistence that they find Young guilty.

The government argues that the prosecutor's admittedly improper statements should not serve as a basis for a new trial because Young's counsel did not object. But the reality of a criminal jury trial is that an objection at that point is counter-productive. Unlike an objection to an improper

question of a witness, which prevents the eliciting of harmful and unfair testimony, an after-the-fact objection to what the prosecutor has already *said* in closing rebuttal argument merely focuses the jury's attention on the prosecutor's statement. Improper conduct by the prosecutor in closing rebuttal argument puts defense counsel in an untenable position before the jury. If the objection is overruled, it undercuts the entire protest defense counsel has previously made, and if sustained, the damage has been done and defense counsel is made to appear as protesting too much. The trial court cannot un-ring the bell that the prosecutor has banged. Emphasis by judge and counsel at that point only makes it worse. The jurors cannot perform the mental gymnastic of forgetting what they have heard so forcefully expressed. So, an objection, even assuming it is sustained, is counter-productive at trial, and undercuts the issue on appeal.

The only remedy for such clear abuse is insistence upon lawful and ethical prosecutorial behavior, enforced by the plain error rule. These points were emphasized many years ago by this Court in *Berger* v. *United States*, 295 U.S. 78 (1935). The matter can hardly be put more clearly than it was by this Court in the *Berger* case:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

* * *

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which

so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations *and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.*

* * *

"In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." 295 U.S. at 88-89 (Emphasis supplied).

The prosecutor's expressions of his personal belief in Young's guilt were not only inherently reprehensible in and of themselves, but they were forcefully directed to the destruction of his only defense. They denied Billy Young a fair trial.

In its opinion reversing this case and remanding it for new trial, the Tenth Circuit Court of Appeals quoted the improper statements by the prosecutor and said:

"These portions of the transcript speak for themselves. The prosecutor repeatedly stated his opinion regarding the Appellant's ~~attempt~~ intent to defraud, the likelihood of future prosecutorial action against one other party involved in the scheme, and the duty of the jurors to find the Appellant guilty. The issue has come before this Court enough times in recent years to establish beyond cavil that such statements constitute prosecutorial misconduct. *United States* v. *Rios*, 611 F.2d 1335 (10th Cir. 1975); *United States* v. *Latimer*, 511 F.2d 498 (10th Cir. 1975); *United States* v. *Coppola*, 479 F.2d 1153 (10th Cir. 1973); *United States* v. *Ludwig*, 508 F.2d 140 (10th Cir. 1974)." (Pet. App. 10a.)

As noted in the above quote, the Tenth Circuit Court of Appeals has in several cases insisted that the prosecutor

observe his ethical obligations so that the jury may decide the case on the evidence and not on the prosecutor's directions to return a verdict of guilty.

In addition to his expressions of his personal belief in Young's intent to defraud, the prosecutor went outside the record and made statements not proven by the evidence. He said: "I think he [*i.e.*, Young] got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of." (Tr. 549).

There is absoluely no evidentiary support whatsoever for the prosecutor's statement that Young "got $.85 a barrel for every one of those 117,250.91 barrels," or that Young got one percent of "every bit of the money they made on that." As the Tenth Circuit Court of Appeals stated in *United States* v. *Latimer*, 511 F.2d 498 (10th Cir. 1975):

"The argument by Government counsel violated two fundamental rules. First the argument went outside the record and made statements as to facts not proven as to the malfunctioning of the camera and that the film showed the FBI agent after the incident. This was clearly improper. [citing cases] Second, the statement put the personal knowledge and belief of the prosecuting attorney on the scales, which is also clearly improper. [citing cases]" *Id.* at 503.

A case similar to the instant case is *United States* v. *Bess*, 593 F.2d 749 (6th Cir. 1979). The defense in *Bess*, like the defense here, was based upon the absence of criminal intent. The prosecutor expressed his personal belief in defendant's guilt. The Sixth Circuit reversed and remanded for a new trial, saying:

"Prejudicial statements are doubly inexcusable when they are made by a prosecuting attorney.

* * *

"An Assistant United States Attorney purports to represent the People of the United States, and thus carries a special aura of legitimacy about him.

* * *

"Implicit in an assertion of personal belief that a defendant is guilty, is an implied statement that the prosecutor, by virtue of his experience, knowledge and intellect, has concluded that the jury must convict. The devastating impact of such 'testimony' should be apparent. Equally apparent should be the serious infringement upon a defendant's due process rights. Such statements infringe upon the role of the jury as fact finder and determiner of guilt or innocence. They amount to inadmissible and highly prejudicial evidence." 593 F.2d at 753-755.

It is impossible to reconstruct here the prosecutor's loud, arm-waving, finger-stabbing closing rebuttal argument. The non-verbal communication was destructive of respondent's defense along with the verbal communication. In its brief in this Court, the government sacrifices its credibility when it characterizes the error of the prosecutor's remarks as "exceedingly marginal" (Government's brief, p. 38), or states that "it is scarcely possible that the prosecutor's remarks could have materially influenced the verdict against respondent" (Government's brief, p. 38), or that "it is virtually impossible that the prosecutor's rebuttal argument could have contributed in any significant respect to the jury's verdict." (Government's brief, p. 39).

In fairness, how can the government seriously advance these propositions? The government cannot know the effect

of the prosecutor's statements on the jury — neither, of course, can respondent. But one thing can be said with certainty: "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Berger* v. *United States*, 295 U. S. at 89.

The Court of Appeals held that the prosecutor's remarks "were sufficiently egregious as to constitute *plain error*." (Pet. App. 10a, emphasis supplied.) The government is hard put to breathe much life into its argument that the Court of Appeals failed to make a "harmless error" analysis. "Plain error," by definition, affects a substantial right and is not harmless. Rule 52(b), Federal Rules of Criminal Procedure. As stated by the Fifth Circuit Court of Appeals in *United States* v. *Miranda*, 593 F.2d 590 (5th Cir. 1979):

> "Having found plain error, it tautologically follows that the government cannot hide behind the 'harmless error' rule. This rule only operates to excuse error where evidence of the defendant's guilt is exceptionally strong and the error appears to have been harmless beyond a reasonable doubt." *Id.* at 596.

The case of *United States* v. *Hasting*, ____U.S. ____, 76 L.Ed.2d 96 (1983), is not applicable. The Court of Appeals did not invoke its supervisory powers in the instant case. It analyzed the prosecutor's statements and found plain error. Also, *Hasting* concerned a prosecutor's alleged reference to the defendants' failure to testify, not expressions by the prosecutor of his personal belief in defendant's guilt. In *Hasting* it was not even clear, as Justice Stevens pointed out in his separate opinion, that the prosecutor's comment

had reference to a failure to testify. Rather, the prosecutor's comment just as logically referred to specific defense testimony. (Stevens, J., concurring, 76 L.Ed.2d at 110.) In short, the matter was ambiguous.

Respondent has no need to quarrel with the *Hasting* decision or the rule of *Chapman* v. *California*, 386 U.S. 18 (1967), which *Hasting* applied. To be sure, "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction." *Chapman* v. *California*, 386 U.S. at 22. This portion of the *Chapman* rule seems little more than a rule of necessity; indeed, appellate courts apply the harmless error rule constantly. But an abstract concept of harmless error has no application in the concrete setting of this case. Indeed, as this Court stated in *Chapman*, before such error can be held harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. Further, as this Court stated in *Hasting*, if an error is harmless then "by definition, the conviction would have been obtained notwithstanding the asserted error." 76 L.Ed.2d at 104.

Under no circumstances can it be convincingly argued that Billy Young would have been convicted if the prosecutor had not given the jury his personal assurances that Young was guilty. Young was entitled to have the jury assess his defense of lack of intent to defraud strictly on the evidence, not on the prosecutor's "testimony" that *he* believed Young intended to defraud Apco. The impact of

the prosecutor's personal belief was compounded by his sarcastic and intimidating final "instructions" to the jury:

> "If you feel you should quit him for that it's your pleasure. I don't think you are doing your job as jurors in finding facts as opposed to the law that this judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it."

The Court of Appeals was not remiss in any duty to evaluate the error below.

The government's case against Young on the issue of fraudulent intent was weak. As often happens in such instances, the case was over-prosecuted. Defense counsel properly pointed out in summation that the case was over-prosecuted. The government's attempt in its brief to bootstrap an argument for "invited response" just doesn't hold water. There is an air of desperation in the government's combing of defense counsel's summation to wrench a word here or there out of context and hold it up as justification for the prosecutor's outrageous rebuttal argument. It won't work. Viewed in context, defense counsel's summation is not provocative and did no more than fairly argue the evidence, save for the six words "including those sitting at this table." It is these words, at bottom, upon which the government predicates its argument for "invited response." The words will not support the argument. They appear in the following context:

> "The indictment says that Billy Young is charged with intending to devise a scheme to defraud Apco and to obtain money and property by false and fraudulent pretenses. And I submit to you that there's not a per-

son in this courtroom including those sitting at this table who think that Billy Young intended to defraud Apco. Now, if you think that Billy Young intended to defraud Apco, if that was his scheme and intent, Billy Young is dead. But that's an element of this charge that the government is obligated to prove beyond a reasonable doubt. * * *" (Tr. 543, 544).

Perhaps it could be honorably argued by the government that defense counsel's remarks entitled the prosecutor to make his first salvo in rebuttal. The prosecutor said:

"I think he said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me." (Tr. 549)

It has been previously noted that there is no evidentiary support for the prosecutor's statements. Nevertheless, if the prosecutor had stopped there, this issue might be a closer question. The prosecutor did not stop there — he repeated his personal belief in respondent's guilt on each subsequent page of his rebuttal argument. The prosecutor's repeated "testimony" of his personal belief in respondent's guilt violated respondent's due process rights. The combination of these inflammatory, intimidating, prejudicial remarks by government counsel constitute plain error requiring reversal.

The footnote in *Lawn* v. *United States*, 355 U.S. 339 (1958), upon which the government relies for its "invited response" argument is not on point. *Lawn* was not a case

where the prosecutor expressed his personal belief in defendant's guilt as in this case. Footnote 15 in *Lawn* states:

"The Government's attorney *did not say nor insinuate that the statement was based on personal knowledge* or on anything other than the testimony of those witnesses given before the jury, and *therefore* it was not improper." *Id.* at 359, n.15. (Emphasis supplied)

The clear inference of the above quoted language is that the prosecutor's blatant assertions of respondent's guilt in *this* case would have been condemned out of hand. A prosecutor's expressions of his personal belief in the defendant's guilt simply deprives the defendant of a fair trial. Indeed, what other holding is possible? Unlike most stratagems of opposing counsel, this is a tactic for which as a practical matter there is no off-setting response available. When the legal representative of the United States Department of Justice from Washington, D.C., stands in front of a jury in Oklahoma and forcefully admonishes them that if the jury should acquit defendant "I don't think you're doing your job as ~~Jurors~~ Jurors," and repeatedly tells them that "I think" defendant is guilty, the effect is devastating. No admonition can erase the prejudical effect of such statements.

There are various cases where a prosecutor has been permitted to respond to inflammatory and egregious conduct of defense counsel. Here, the six words ("including those sitting at this table")[6] spoken by defense counsel in his lengthy closing argument were mild, made in passing,

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[6] It might be well to note that the FBI agent who investigated the case was sitting at the table, too.

and unprovocative. It is submitted that they cannot, in a fair system of justice, provide a basis for the repeated, intemperate statements by the prosecutor.

It is simply a fact that prosecutors frequently make improper remarks during closing argument. The remarks come at a time when defense counsel is least able to counteract them effectively. The case of *United States* v. *Garza*, 608 F.2d 659 (5th Cir. 1979), is illustrative. The Fifth Circuit Court of Appeals stated the issue as follows:

> "This case presents nothing new -- no new issue of law or unique factual configuration. It presents rather a situation far too common and too often condemned by this court to be in any manner excusable. We must again deal with grossly improper prosecutorial comment during closing argument which substantially prejudiced defendant's right to a fair trial on the evidence presented in this case." 608 F.2d at 661.

In *Garza*, one of the justifications claimed by the government for the prosecutor's misconduct was that defense counsel had "invited" the improper response. Defense counsel stated in his closing argument: "Fine, I want to protect society from criminals, and you do to, but I don't want innocent people going to jail, and I'm sure you don't either." 608 F.2d at 662.

In rebuttal argument, the prosecutor responded to these comments by saying: "And, ladies and gentlemen, if I thought that I had ever framed an innocent man and sent him to the penitentiary, I would quit. Now, I resent the innuendoes that I would stand up here and try to send an innocent man to the penitentiary, and that's what it was. I resent that because it's simply not true because, believe

you me, there is presently enough work to do without fooling around with innocent people. Plenty enough. All over the place." *Id.* at 662.

In reversing, the Fifth Circuit Court of Appeals, quoting from one of its earlier decisions, stated:

> "Expressions of individual opinion of guilt are dubious at best. * * * This statement takes guilt as a predetermined fact. The remark is, at the least, an effort to lead the jury to believe that the whole governmental establishment had already determined appellant to be guilty on evidence not before them." *Id.* at 665.

In response to the government's contention that the prosecutor's remarks were "invited" by defense counsel, the Court of Appeals stated:

> "This statement was ostensibly in response to defense counsel's argument to the jury that, while society needed protection from criminals, such need did not justify convicting innocent people. But while defense counsel's argument can at most be construed as contending that the evidence did not warrant defendant's conviction, prosecution's argument went far beyond the evidence and sought to invoke the prosecutor's own credibility as a basis for a conviction." *Id.* at 665, n.4.

The *Garza* prosecutor made other statements of his personal belief in defendant's guilt. Defense counsel did not object. Finding that the prosecutor's remarks rose to the level of "plain error" the Court of Appeals stated:

> "While any single statement among those we have isolated might not be enough to require reversal of the conviction — and, indeed, some clearly would not — we think it beyond question that the prosecutor's improper comments, taken as a whole, affected substantial rights of the defendant. * * * In addition, as this Court ob-

served in overturning a conviction because of improper prosecutorial comment, despite a corrective instruction, once such statements are made, the damage is hard to undo: 'Otherwise stated, one "cannot unring a bell"; "after the thrust of the sabre it is difficult to say forget the wound"; and finally, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it."' *Dunn* v. *United States*, 307 F.2d 883, 886 (5th Cir. 1962)." *Id.* at 665, 666.

The court observed that "objection to these extremely prejudicial comments would serve only to focus the jury's attention on them," and suggested that "in such circumstances the trial judge has an obligation to intervene to assure protection of defendant's right to a fair trial." *Id.* at 666 and n.7.

Also see, *Houston* v. *Estelle*, 569 F.2d 372 (5th Cir. 1978); *United States* v. *Meneses-Davila*, 580 F.2d 888 (5th Cir. 1978).

The *Garza* court accurately noted the perils of objecting to the prosecutor's improper remarks because such objections "serve only to focus the jury's attention" on the remarks. The same point was observed in *Brown* v. *Estelle*, 468 F.Supp. 42 (N.D. Tex. 1978). In *Brown*, defense counsel objected to some of the prosecutor's closing statements and not to others. The court noted that "On other occasions no objection was made in the fear, perhaps, that to do so would only emphasize the improper remarks or prejudice his client in the eyes of the jury by over objecting." *Id.* at 45.

The prosecutor's remarks in the case at bar went far beyond any rebuttal "invited" by defense counsel's closing. The remarks denied Billy Young a fair trial on the evidence.

CONCLUSION

The prosecutor told the jury in the first sentence of his opening statement that, "I'm a trial attorney in the fraud section of the Department of Justice headquartered in Washington." (Tr. 22). In his closing rebuttal argument, the prosecutor "testified" as his own expert. Clothed with his "special aura of legitimacy," the prosecutor told the jury that in his opinion respondent intended to defraud, and admonished the jurors of their duty to find respondent guilty. The prosecutor also made statements of his belief that respondent personally profited from the sales to Apco. This statement of the prosecutor's personal belief was without any support in the evidence; in fact, the testimony at trial, including the testimony of the FBI agent who investigated the case, was directly contrary to the prosecutor's statement.

These statements by the prosecutor of personal belief and knowledge carried "much weight against the accused." They denied Young the most fundamental of all rights in a civilized society — the right to a fair trial. They were plain error.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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